

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRISTOPHER McDANIEL,

Defendant-Appellant.

UNPUBLISHED

July 14, 2011

No. 297738

Wayne Circuit Court

LC No. 09-012026-FC

Before: MURRAY, P.J., and FITZGERALD and RONAYNE KRAUSE, JJ.

PER CURIAM.

A jury convicted defendant of armed robbery, MCL 750.529, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant as an habitual offender, second offense, MCL 769.10, to concurrent prison terms of 12 to 25 years for the armed robbery conviction, 4 to 7-1/2 years for the felon in possession conviction, and to a consecutive 2 year term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

I

Defendant first argues that it was improper for the victim, a DTE Energy service representative, to view a composite sketch of a suspect that was prepared by a police artist in relation to the armed robbery of a United States Postal Service mail carrier that had occurred the same morning that the victim had been robbed. The sketch was shown to the victim two days after he was robbed in order to determine whether the same suspect might have committed both robberies. Defendant maintains that the victim's photographic lineup identification made nine days after the robbery was tainted by his viewing of the sketch. He does not maintain that the photographic lineup itself was improper or unduly suggestive.

"A photographic identification procedure violates a defendant's right to due process of law when it is so impermissibly suggestive that it gives rise to a substantial likelihood of misidentification." *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998). A court must evaluate the fairness of an identification procedure in light of the total circumstances to ascertain whether the procedure qualifies as so impermissibly suggestive that it gave rise to a very substantial likelihood of irreparable misidentification. *Kurylczyk*, 443 Mich at 311-312; *People v McCray*, 245 Mich App 631, 639; 630 NW2d 633 (2001).

The totality of circumstances does not suggest that the victim's viewing of the composite sketch of the suspect before viewing the photographic lineup resulted in a substantial likelihood of misidentification. Martin, A United States Postal Inspector, stated that he showed the victim the sketch merely to help determine if the same suspect was involved in both armed robberies. The victim himself testified that the sketch did not have any influence on his identification of defendant in the photographic lineup. Nothing occurred during the photographic lineup to suggest to the victim that he should select defendant's photograph. The victim stated that he selected defendant's photograph because defendant was the individual who robbed him. During the armed robbery, the victim had a clear view of defendant's face when the two were standing about eight to ten feet apart. The trial court did not err in admitting the identification evidence. See *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 7000 (2002).

The need to review whether an independent basis exists to support in-court identification testimony arises only when there is evidence that the lineup procedures used were unduly suggestive. *Kurylczuk*, 443 Mich at 303; *People v Barclay*, 208 Mich App at 670, 675; 528 NW2d 842 (1995). Because the lineup procedures in this case were not unduly suggestive, this Court need not review whether an independent basis existed. *People v Whitfield*, 214 Mich App 348, 351; 543 NW2d 347 (1995).

Defendant also asserts he was denied the effective assistance of counsel when defense counsel failed to seek the suppression of Bridges' pretrial identifications of defendant and failed to call an expert witness in the area of the limitations of eyewitness identification. Defendant failed to make a testimonial record in the trial court and, therefore, review is limited to mistakes apparent on the record. *People v Noble*, 238 Mich App 647, 661; 608 NW2d 123 (1999). To establish a claim for ineffective assistance of counsel, a defendant must show (1) that counsel's assistance fell below an objective standard of professional reasonableness, and (2) that but for counsel's ineffective assistance, the result of the proceeding would have been different. *Strickland v Washington*, 466 US 668, 687-688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Effective assistance of counsel is presumed, and the defendant bears a heavy burden to prove otherwise. *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). Thus, the defendant must overcome a strong presumption that defense counsel's action constituted sound trial strategy. *People v Pickens*, 446 Mich 298, 330; 521 NW2d 797 (1994). Counsel's decision to not seek the suppression of identification evidence is a matter of trial strategy. *People v Wilki*, 132 Mich App 140, 145; 347 NW2d 735 (1984).

In reviewing the existing record, defendant has not proven that counsel's failure to seek suppression of identification evidence constituted deficient performance.¹ As previously discussed, defendant has not alleged that the photographic lineup procedure was unduly suggestive. Counsel is not obligated to make futile objections or motions, and therefore, defense counsel was not ineffective for failing to seek to suppress the photographic lineup. *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002). Defendant has not overcome the

¹ Defense counsel brought to the court's attention at a hearing on March 5, 2009, that defendant wished to present a handwritten motion to suppress the pretrial identification.

presumption that counsel's actions constituted sound trial strategy. Furthermore, given the evidence against defendant, including the testimony of O'Neal and Bridges that defendant was the person who robbed them and the independent basis for the in-court identifications of defendant, any deficiency in counsel's performance did not prejudice defendant. Counsel was not ineffective on this basis.

Similarly, defense counsel was not ineffective for failing to call an expert witness in the area of eyewitness identification. Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy and this Court will not review defense counsel's decisions with the benefit of hindsight. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). The failure to call a witness or present other evidence can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). A substantial defense is one that might have made a difference in the outcome of the trial. *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009).

Defendant has not proven that counsel's failure to call an expert witness in the area of eyewitness identification constituted deficient performance. At trial, defense counsel examined the victim regarding his in-court identifications of defendant and his selection of defendant from the photographic lineup. During closing argument, defense counsel asserted that no physical evidence linked defendant to the crime and reiterated the discrepancies in the victim's identifications of defendant. Defense counsel could have reasonably concluded that "the jury would react negatively to perhaps lengthy expert testimony that it may have regarded as only stating the obvious: memories and perceptions are sometimes inaccurate." *People v Cooper*, 236 Mich App 643, 658; 601 NW2d 409 (1999). Counsel's decision not to call an expert witness constituted sound trial strategy that did not deprive defendant of a substantial defense because it was not outcome determinative.

II

Defendant next argues that the trial court erred by allowing the identity of a tipster who called the 800 number listed on a reward poster to remain confidential, thereby depriving defendant of his right of confrontation and due process of law. A trial court's decision regarding whether to order the production of a confidential informant is reviewed for an abuse of discretion. *People v Poindexter*, 90 Mich App 599, 608; 282 NW2d 411 (1979).

This issue concerns only the identity of the individual who called in a tip regarding the defendant's identity and location on April 29, 2009.² The identity of the tipster is known to police but confidential.

Generally, a prosecutor is not required to disclose the identity or testimony of confidential informants as a result of the "informer's privilege." *People v Sammons*, 191 Mich

² The identity of the first caller on April 24, 2009, was anonymous.

App 351, 368; 478 NW2d 901 (1991). However, if the defendant demonstrates a possible need for the informant's testimony, the trial court should order the informant produced and conduct an *in camera* hearing in order to determine whether he could offer any testimony helpful to the defense. MCR 6.201(C); *People v Underwood*, 447 Mich 695, 706; 526 NW2d 903 (1994). Determining whether there is a need depends on the circumstances of the case. *Underwood*, 447 Mich at 705, citing *Roviaro v United States*, 353 US 53; 77 S Ct 623; 1 L Ed 2d 639 (1957). To determine the need, a court should consider "the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors ." *Underwood*, 447 Mich at 705, citing *Roviaro*, 353 US at 62.

At a pretrial hearing on February 26, 2010, the prosecutor moved for the tipster's identity to remain confidential to protect him. Defendant objected. The postal inspector showed the court a confidential letter that apparently revealed why the tipster was at risk. After reading the letter, the trial court stated on the record:

Let the record reflect that I've had a brief opportunity to discuss off the record with both counsel the matter. The Court review [sic] the document, the tip document. From what the Court knows of the case, the names in the case and the general circumstances from the first trial [the robbery involving O'Neal], the Court at this initial point believes that the disclosure of the identity of that person could put that person in serious jeopardy for that person's life.

The trial court asked for briefing on the motion and continued the hearing to March 5, 2010. The prosecutor reiterated that the basis of their motion was "the well being of the source." The trial court balanced the relevancy of the tipster's testimony against concern for his personal safety and ruled that the identity would remain confidential:

But I think the, the rationale or at least some of the rationale from the confidential informant cases is just as applicable whether we're calling it confidential informant or anonymous or whatever. There's a legitimate issue of safety of the identity of the witness. And in this particular case the Court has sat through the prior trial and I'm assuming the People's proofs aren't going to be terribly different in the next trial. In terms of the person or person, there's two that have made the identification upon which the sketch was, the sketch was based, and we've got this person who looking at that sketch called into the postal people and gave information as to well, it looks like McDaniel, and here's where you can find him. While certainly there may be some minimal relevancy as to the identity, I mean that has to be weighed against the legitimate safety concerns of that witness' identity. And I mean even assuming that person is identified and that person is called to the stand what are they going to be questioned on? Well, is this the you know, does this picture look like him, or – I mean, what, where would anyone go with that?

So although there's some minimal relevance, the Court has to . . . be mindful that the heart of this case isn't this confidential [or] anonymous person, but the identification of two folks who made an identification, had a sketch made. And the Court is going to, isn't going to divulge the source or the name of the

person who made the tip to the postal service, which gave the postal service a name upon which to go.

Constitutional due process only requires the disclosure of “exculpatory or material” evidence. The right of confrontation provides for a face-to-face confrontation between a defendant and his accusers at trial. A tipster’s tip that he can identify the person in a sketch is not exculpatory. The tipster in this case did not accuse defendant of a crime nor was the information provided used against defendant at trial. How the police were alerted to defendant’s identity is not relevant and is of no help in determining whether defendant committed the crimes. The evidence is, therefore, immaterial. Because the tipster did not offer any evidence against defendant, defendant was not deprived of his due process rights or his right of confrontation. The trial court did not abuse its discretion by refusing to order production of the identity of the tipster.

Affirmed.

/s/ Christopher M. Murray

/s/ E. Thomas Fitzgerald

/s/ Amy Ronayne Krause